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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-704

SHERWOOD SLATE,
Appellant,

v.

JOSEPH N. NOLL,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WISCONSIN

MOTION TO AFFIRM

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Appellee.

ON APPEAL FROM THE
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OF WISCONSIN

MOTION TO AFFIRM

QUESTIONS PRESENTED

1. Did the retirement of the appellant at age 65 pursuant to the provisions of Wis. Stats. §§41.02 (23) and 41.11 (1) (1973) deny him equal protection of the law?

2. Did the retirement of the appellant at age 65 pursuant to the provisions of Wis. Stats. §§41.02 (23) and 41.11 (1) (1973) deprive him of liberty and property without due process of law?/[1]

STATEMENT OF THE CASE

The appellant, Sherwood Slate, was born on January 7, 1909, and employed as a hearing examiner by the Wisconsin Industrial Commission on September 21, 1964, at the age of 55. At that time, the provisions pertaining to the Wisconsin Retirement Fund were contained within Wis. Stats. ch. 66 (1963). Wisconsin Statutes §66.906 (1) (a), thereof, provided that any participating employe in the fund, except state appointed officers, shall be retired at the end of the first calendar quarter of the year in which he reached 65, unless the appointing official authorized him to continue in an employment for a period or periods not to exceed one year at a time. Prior to his employment with the state, the appellant was engaged in the private practice of law in Milwaukee, Wisconsin.

On October 20, 1966, the Wisconsin Industrial Commission adopted a policy which provided that an employe could request an extension of his normal retirement date until the end of the calendar year. Said Commission was renamed the Wisconsin Department of Industry, Labor and Human Relations by ch. 75,

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/[1]The appellant at pages 3 and 4 of his Jurisdictional Statement cited the Wisconsin statutes as of the year 1975, instead of 1973 which were applicable at the time. However, the provisions contained therein were the same. It should also be noted that Wis. Stats. §42.531 pertained to those members in the classified service of the state within the state teachers retirement system contained in Wis. Stats. ch. 42 (1973).

sec. 21, Wisconsin Laws of 1967, and placed under the direction and supervision of a three-member Industry, Labor and Human Relations Commission. Those provisions contained in Wis. Stats. ch. 66, pertaining to the Wisconsin Retirement Fund were repealed, recreated, renumbered, and amended by ch. 158, Wisconsin Laws of 1969, and placed within Wis. Stats. ch. 41 (1971). Wisconsin Statutes §41.02 (23), thereof, set forth the "normal retirement date" for regular civil service employes included in the fund at 65. Wisconsin Statutes §41.11 (1) thereof provided that any participating employe, except an officer elected by vote of the people, shall be retired at the end of the first calendar quarter within which he reaches his normal retirement date unless his employement is continued by his employer or appointing authority.

On November 27, 1972, the Department of Industry, Labor and Human Relations adopted a policy which provided that all employes must retire at the end of the calendar quarter in which they reach 65 and that no extensions would be granted. However, since some employes had already been extended through calendar year 1973, the Department agreed to consider requests made by December 31, 1972, for extensions to the end of 1973. (Affidavit of Stephen J. Reilly, Doc. 32; Exhibit A attached to the Complaint, Doc. 2).

On June 22, 1973, the appellant, by letter, requested the Industry, Labor and Human Relations Commission to grant him an extension of his retirement date for one year. The Commission by letter dated July 17, 1973, denied his request in accordance with its policy that *no* extensions would be granted for any Department employe beyond December 31, 1973. On February 4, 1974, the appellant again requested an extension of his retirement date, which also was denied by the Commission on February 13, 1974. (Exhibits B and C attached to the Complaint, Doc. 2; Affidavit of Stephen J. Reilly, Doc. 32).

The appellant became 65 on January 7, 1974, and his employment with the Department was terminated on April 8, 1974. He was granted a monthly annuity or pension of $98.03, effective April 9, 1974, based upon 9.042 years of creditable service. He selected option three which provided for a survivor annuity as well as an annuity for himself. Had he selected option one, or just an annuity for himself, he would have received a monthly annuity of $158.34. (Affidavit of Clyde M. Sullivan, Doc. 31). Appellant's request for reinstatement and reemployment dated July 24, 1974, was denied by the Commission on August 2, 1974. (Affidavit of Stephen J. Reilly, Doc. 32).

The appellant filed a complaint with the United States District Court for the Western District of Wisconsin on September 20, 1974. The complaint alleged that Wis. Stats. §42.531 and the compulsory retirement policies of Wisconsin and the Department of Industry, Labor and Human Relations violated the fourteenth amendment of the United States Constitution, since they deprived and are depriving appellant of due process and equal protection of the law. The appellant requested the court: (1) to convene a three-judge court; (2) to issue a preliminary injunction and to require his reinstatement; (3) to adjudge that Wis. Stats. §42.531 and the Department's administrative policies adopted pursuant thereto to be unconstitutional; (4) to issue a permanent injunction; and (5) to issue an order requiring the continuance of his employment until such time as he voluntarily retires or is physically or mentally incapable of performing his assigned duties. (Complaint, Doc. 2).

A motion to dismiss the complaint was filed on October 2, 1974. (Doc. 4). The appellant filed a motion for the convening of a three-judge court on October 7, 1974. (Doc. 5). An order designating a three-judge court

was entered on October 31, 1974. (Doc. 6). The appellant filed an amendment to the complaint on November 1, 1974, to include Wis. Stats. §§41.11 (1) and 41.02 (23). (Doc. 7). On December 10, 1974, the appellant filed a motion for a preliminary injunction and for summary judgment. (Doc. 10).

Pursuant to §§44 and 993-998 of ch. 29, Wisconsin Laws of 1977, the Department of Industry, Labor and Human Relations was placed under the direction and supervision of a secretary rather than the commissioners. The motion to dismiss was denied by the court by order dated May 25, 1978. (Doc. 15). On the same date, the court issued another order which provided that it proposes to decide that merits of the case following the hearing scheduled for June 21, 1978, and that each party shall serve and file such additional evidence he desires to offer by June 15, 1978. (Doc. 16). An answer to the complaint together with affidavits was filed on June 5, 1978. (Doc. 17, 18, and 19). On June 15, 1978, the appellant filed a series of affidavits. (Doc. 20-25).

The statutory purposes of the Wisconsin public employe retirement system is in effect set forth in Wis. Stats. §§40.01 (1) and 41.01 (1) (1973), concerning the Wisconsin public employe trust fund and retirement fund. They are: (1) to protect public employes and their beneficiaries against the hardships of old age; (2) to promote economy and efficiency in public service by facilitating the attraction and retention of competent employes; (3) to enhance employe morale; and (4) to provide for the orderly and humane departure of employes. Mr. John L. Zimbeck, Deputy Secretary of the Wisconsin Department of Employe Trust Funds, stated that some age has to be selected to provide a reference point on which actuarial equivalents can be based. (Zimbeck Affidavit, Doc. 19). Mr. Blair Testin, Director of Retirement Research for the State of

Wisconsin stated that the normal retirement age for regular employes was established by the Wisconsin Legislature for the following reasons: (1) to provide for an orderly removal of older workers without hardships or prejudice; (2) to permit an employer to plan for personnel needs in an orderly manner; (3) to permit employes to plan for retirement based upon a specific date; (4) to permit the employment of young workers to fill the vacancies created; and (5) to permit the corrections of past discriminations based upon sex and race. (Testin Affidavit, Doc. 18).

Some employes have been continued in state employment by their employer after their normal retirement date. As of March 13, 1978, 216 men and 219 women over age 65 were continued in employment. Policemen and firemen, whose normal retirement date is 55, sometimes continue their employment. Likewise, judges who have a normal retirement date for pension purposes of 62 frequently work until their compulsory retirement age of 70. The calculations and computations of pension annuities for such employes does not involve any administrative inconvenience, however, a normal retirement date is required to provide a reference point on which actuarial equivalents can be based. (Supplemental Affidavit of John L. Zimbeck, Doc. 23).

The appellant, Sherwood Slate, in his affidavit, states that the appellee, in terminating his employment failed to consider his experience, training, and competence to remain in employment; and that this action reduced his income, standard of living, and has caused him considerable concern. (Doc. 21). Dr. H.K. Parks, in his affidavit, concluded that people age at different rates, that the age of an individual has no relationship to competency to perform ordinary tasks of employment, and that retirement may affect the health and well-being of a patient. (Doc. 25).

Appellant's attorney by affidavit requested the court to take judicial notice of certain facts, *inter alia,* including those contained in the report of the House of Representatives Select Committee on Aging, *Mandatory Retirement: The Social and Human Cost of Enforced Idleness,* Comm. Pub. No. 95-91 (August, 1977), and Senate Report No. 95-493 (October, 1977), which resulted from hearings conducted by the House of Representatives prior to the enactment of the 1978 amendments to the Age Discrimination in Employment Act.

The court held that the appellant failed to meet the burden of proving that the Wisconsin statutes providing for mandatory retirement of state employes at age 65 were not rationally related to furthering of a legitimate state interest, and accordingly, dismissed the action. *Slate v. Noll,* 474 F. Supp. 882, 888 (W.D. Wis. 1979). The appellant appeals therefrom.

ARGUMENT

The Constitutional Issues Raised Are Are Not Substantial.

A. The retirement of the appellant at age 65 did not deny him equal protection of the law.

1. This court has consistently upheld the constitutionality of mandatory retirement statutes which are rationally related to a legitimate state interest.

Although this court applied the strict scrutiny or the rational basis test to cases involving constitutional challenges to statutes involving education and welfare *(Shapiro v. Thompson,* 394 U.S. 618 (1969); *Dandridge v. Williams,* 397 U.S. 471 (1970); and *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973)), the early challenges to the constitutionality of mandatory retirement statutes were dismissed on the ground that they failed to involve a substantial federal question. A Pennsylvania statute requiring mandatory retirement of policemen at age 60 was held not to violate the Federal Age Discrimination in Employment Act or the fourteenth amendment to the United States Constitution. *McIlvanie v. Pennsylvania State Police,* 6 Pa. Commw. Ct. 505, 296 A. 2d 630 (1972), *aff'd* 309 A. 2d 801 (1973). An appeal therefrom was dismissed by this Court for want of a substantial federal question. *McIlvanie v. Pennsylvania State Police,* 415 U.S. 986 (1974). The court in *Weisbrod v. Lynn,* 383 F. Supp. 933 (D.C. 1974), dismissed a challenge to the mandatory retirement of federal employes at age 70 for want of a substantial

federal question. *Weisbrod v. Lynn, aff'd* 420 U.S. 940 (1975), *reh. den.* 423 U.S. 886 (1975).

The Court, however, considered whether the strict scrutiny or rational basis test should be applied to mandatory retirement statutes in *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976). In that case the appellee alleged that the Massachusetts' statute requiring a uniformed state officer to be retired at age 50 denied him equal protection of the law in violation of the fourteenth amendment. This court stated at pages 312-13 that:

> We need state only briefly our reasons for agreeing that strict scrutiny is not the proper test for determining whether the mandatory retirement provision denies appellee equal protection. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed. 2d 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. Mandatory retirement at age 50 under the Massachusetts statute involves neither situation.

The Court in applying the rational basis test held:

> In this case, the Massachusetts statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally furthers the purpose identified by the State: Through mandatory retirement at age 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability

> generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective.

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 315-16.

Since then, the courts have applied the rational basis test in determining whether statutes involving mandatory retirement violate the Equal Protection and Due Process Clauses contained in the fourteenth amendment. *Cannon v. Guste,* 11 FEP Cases 675 (1975), *aff'd* 423 U.S. 918 (1975); *Gault v. Garrison,* 569 F. 2d 993 (7th Cir. 1977), *cert. den.* 440 U.S. 945 (1979); *Vance v. Bradley,* 440 U.S. 93 (1979); *Johnson v. Lefkowitz,* 566 F. 2d 866 (2nd Cir. 1977), *cert. den.* 440 U.S. 985 (1979); *Palmer v. Ticcione,* 576 F. 2d 459 (2nd Cir. 1978), *cert. den.* 440 U.S. 945 (1979); and *Trafelet v. Thompson,* 594 F. 2d 623 (7th Cir. 1979), *cert. den.* ___ U.S. ___ (1979). The courts upheld the constitutionality of the mandatory retirement statutes involved in the above cases with the exception of *Gault.* The appellee, in said case, failed to identify any state purpose other than to hint that that statute was designed to remove unfit teachers. *Gault v. Garrison,* 569 F. 2d at 995-96.

2. The Wisconsin statutes involved are rationally related to furthering a legitimate state interest.

As previously noted, Wis. Stats. §41.02 (23) (1973) provided for the normal retirement date of a state civil service employe at age 65. Likewise, Wis. Stats. §41.11 (1) (1973) provided that a state civil service employe shall be retired at the end of the calendar quarter year

in which he reaches his normal retirement date unless continued in employment by his employer. Thus, the Wisconsin Legislature delegated to the heads of the various state agencies the discretion to continue the employment of an employe beyond his normal retirement date. Acting pursuant to then existing state law, the Wisconsin Department of Industry adopted a policy which provided that *all* employes must retire at the end of the calendar quarter in which they reach 65 and that no extensions would be granted. Thus, this policy applied across-the-board to all its employes.

Wisconsin Statutes §41.02 (23) (1973) provide for different normal retirement dates for other public employes included within the Wisconsin retirement system such as: protective employes at age 60 and those elected by the voters including judges and members of the Legislature at age 62. However, judges were not required to retire until age 70. Wis. Const. art. VII, sec. 24 (2). This Court in *Vance v. Bradley,* 440 U.S. at 97 stated: "Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Unquestionably the state interests are legitimate. The lower court identified them as achieving and maintaining a certain level of physical, mental, and emotional competence among governmental employes as well as to promote employe planning for retirement, meeting personnel needs in an orderly manner, employing younger workers, correcting past discrimination, and removing older workers in an orderly manner. (A-Ap. 6-9). No substantial federal question is raised in respect to these objectives. The court in *Johnson v. Lefkowitz,* 566 F. 2d at 869, held that a mandatory retirement policy requiring civil

service officers at age 70 would allow department heads to plan the training and advancement of their employes and motivates young workers to acquit themselves well and progress through the ranks was reasonably related to legitimate state interests in efficiency and economy. In *Cannon v. Guste,* 11 FEP Cases at 676, the court held that a statute requiring the mandatory retirement of state employes at age 65 was substantially related to the state's economic objective of maintaining an efficient, vigorous, and healthy civil service and of establishing a feasible system for promotion of younger employes. In *Palmer v. Ticcione,* 576 F. 2d at 462, the court held that a state mandatory retirement system which opens up more places for minorities and assures predictability and ease in establishing and administering pension plans was rationally related to legitimate state objectives. In *Trafelet v. Thompson,* 594 F. 2d at 626, the court concluded that "we are not limited to the legislative purpose articulated by the state at the time of enactment, although even if we were we would sustain the statute."

Not only is there no substantial federal question as to the legitimacy of state objectives, neither is there a substantial federal question as to the rationality of drawing the line at age 65. As the lower court correctly noted, (A-Ap. 10):

> But plaintiff [appellant] has not succeeded in the essential, though perhaps impossible, task of showing that there is no significant discrepancy in the incidence of incompetence resulting from aging among those approximately 55 to 60 years of age as contrasted with those approximately 70 to 75 years of age. In the absence of such a showing, the legislative choice of an age between 60 and 70 must be accepted.

There can be no substantial doubt of the correctness of the court's holding in light of this Court's action in upholding an age 50 cut-off in *Murgia* for police officers and an age 60 cut-off in *Vance* for those in the foreign service.

Appellant cannot successfully argue that *Murgia* and *Vance* concerned only discreet groups of employes rather than generalized civil service rules. Those cases concerned discreet groups only because it was necessary to examine the justification for treating them differently than employes generally are treated. This Court gave no hint that across-the-board generalizations were impermissible. Indeed, it underscored the importance of deferring to legislative line-drawing despite resultant imperfections in under or over inclusiveness. *Vance v. Bradley,* 440 U.S. at 108-09. Similarly, appellant cannot at once fault the generalized rule because it is generalized and at the same time complain that there are, in addition, discreet groups of employes in Wisconsin not bound by the age 65 cut-off, especially since appellant does not purport to show that the classification "could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley,* 440 U.S. at 111.

B. The retirement of appellant at age 65 did not deprive him of liberty and property without due process of law.

1. Compulsory retirement provisions should not fall as violative of the due process clause because a rationally based statutory classification may also be labelled an irrebuttable presumption.

Many lower courts have held that a due process attack on compulsory retirement as establishing an irrebuttable presumption "is analytically very similar to the equal protection [claim]." *Palmer v. Ticcione,* 576 F. 2d at 463 and *Johnson v. Lefkowitz,* 566 F. 2d at 869.

In addition, in the context of mandatory retirement, this due process claim has been consistently rejected by the courts. *McIlvanie v. Pennsylvania State Police,* 415 U.S. 986; *Weisbrod v. Lynn,* 383 F. Supp. 933; *Palmer v. Ticcione,* 576 F. 2d 459; *Trafelet v. Thompson,* 594 F. 2d 623; *Johnson v. Lefkowitz,* 566 F. 2d 866; and *Rubino v. Ghezzi,* 512 F. 2d 431 (2nd Cir. 1975), *cert. den.* 423 U.S. 891 (1975). The reason for this rejection is that the doctrine of irrebuttable presumptions is considered as "coextensive with the equal protection clause." *Trafelet v. Thompson,* 594 F. 2d at 630. Thus, as the court in *Palmer* properly concludes "[i]f the statutory classification is sustainable as rationally based, then it should not fall because it might also be labeled a presumption." *Palmer v. Ticcione,* 576 F. 2d at 463.

Granted, the irrebuttable presumption doctrine remains applicable to cases involving suspect classifications. *See Johnson v. Lefkowitz,* 566 F. 2d at 869; *Frontiero v. Richardson,* 411 U.S. 677 (1973), and *The Irrebuttable Presumption Doctrine in the Supreme Court,* 87 Harv. L. Rev. 1534 (1974). However, as *Massachusetts Bd. of Retirement v. Murgia* instructs, 427 U.S. at 313-14, age is not a suspect classification in the context of mandatory retirement cases. Therefore, the irrebuttable presumption doctrine does not apply to mandatory retirement cases.

2. Due process protects only liberty and property interests.

Procedural due process does not protect against all losses. It is confined to property and liberty interests. More specifically, the interests in property and liberty which due process protects relate to a right or status "previously recognized by state law ... [which has become] distinctly altered or extinguished." *Paul v. Davis,* 424 U.S. 693, 711 (1976).

3. Appellant has raised no substantial federal question as to liberty interests.

As articulated above, the appellee has put forth the state's legitimate interests in requiring mandatory retirement at age 65 for classified civil servants. No such articulated interest involves a presumption of incompetency on the part of any individual classified civil servant. In *Palmer,* the court stated:

> Unrelated to any notion of physical or mental fitness, a state might prescribe mandatory retirement for teachers in order to open up employment opportunities for young teachers — particularly in the last decade when supply has outpaced demand, or to open up more places for minorities, or to bring young people with fresh ideas and techniques in contact with school children, or to assure predictability and ease in establishing and administering pension plans. A compulsory retirement system is rationally related to the fulfillment of any or all of these legitimate state objectives.

Palmer v. Ticcione, 576 F. 2d at 462. The case at bar presents substantially similar rational bases for the statutes in question. Such bases are unrelated to any notion of appellant's physical or mental fitness and

are thus unrelated to any notion of incompetency with respect to the appellant.

4. Appellant has raised no substantial federal question as to property interests.

"[P]ublic employment is not a constitutional right." *Personnel Adm'r of Massachusetts v. Feeney,* ___ U.S. ___, 99 S.Ct. 2282, 2293 (1979). No fundamental right or suspect classification is involved. *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. at 313. A claim of entitlement to a job, in order to enjoy due process protections, "must be decided by reference to state law." *Bishop v. Wood,* 426 U.S. 341, 344 (1976).

The argument that mandatory retirement laws abridge a right to engage in a common occupation was expressly rejected in *Armstrong v. Howell,* 371 F. Supp. 48, 54 (D. Neb. 1974), and in *Gossman v. State Employees Retirement System,* 177 Neb. 326, 129 N.W. 2d 97 (1964). Both cases involved civil service employes; the former involved county employes, and the latter involved state employes. In *Gossman,* Chief Justice White stated:

> The State, in this case, is in the position of an employer. It is in the position of setting up the terms and conditions under which the State will contract for employment and under which an employee may or may not, according to his wishes, accept the proffered conditions. All that is required is that the classifications and the requirements thereunder must have some reasonable relation to the purposes and objectives of the Act. The purposes and objectives of the Act in this situation are to set up conditions and requirements of employment

> which the employee is free to accept or reject. In evaluating this situation, we take notice of the fact that the State is an employer on the labor market and must meet, and is subjected to, the competitive influences and pressures that are present under modern economic conditions. In the light of this situation, it is reasonable for it to hold out and to set up inducements to employees in a retirement act.... The Legislature has a right to define and determine what conditions or objectives are reasonable in this area. It is clear that State employment is not a vested right, but it is extended at the will of the State, and the State may reasonably make a mandatory retirement system as a condition of such employment, and if this be so, it follows that the State has a right to impose such conditions are economically and practicably sound.

Gossman v. State Employees Retirement System, 129 N.W. 2d at 103.

In *Board of Regents v. Roth,* 408 U.S. 564, 576 (1972), this Court stated that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." The Court further stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. ...

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. at 577. As articulated above, state employment is not a vested right, but is subject to the authority of the state. The same rationale applies to an alleged property interest. Thus, it is clear the appellant possessed no liberty or property interests in need of due process procedural safeguards. Appellant had no vested liberty or property interest in his civil service employment. Existing statutes and administrative rules provided no objective bilateral expectation of continued employment past age 65.

5. In any event, the state's interests prevail.

Assuming *arguendo* that appellant's compulsory retirement affected his liberty or property rights, the state's legitimate interests in mandatory retirement override same. The plaintiff in *Johnson v. Lefkowitz,* 566 F. 2d at 869, maintained that he was deprived of his tenured civil service position without due process. He claimed that he was entitled to a hearing either at the time of his mandatory retirement or at the time his final extension was refused. The appellant maintains a substantially similar position in the case at bar. *See* Appellant's Jurisdictional Statement, p. 17. The second circuit in *Johnson v. Lefkowitz* expressly rejected this position. The court stated:

> Appellee suggests that Johnson's due process argument is wholly misguided since his termination affected neither a protected property or liberty interest. We need not, however, reach the state's argument. Assuming *arguendo* that Johnson's dismissal affected his property or liberty, a determination of constitutionally mandated procedures requires that the interests of the individual in being afforded such safeguards be balanced against the burden to the state in conducting them. *It is clear to us that the administrative cost to the state of providing each retiree with a hearing would be enormous, and by far outweigh the hardship to the individual.*

Johnson v. Lefkowitz, 566 F. 2d at 869. (Emphasis added).

The same result was reached by the seventh circuit in deciding *Trafelet v. Thompson,* 595 F. 2d 623. That case involved a constitutional challenge to mandatory retirement laws applicable to judges. Specifically, the court stated: "[T]he existence of other means for evaluating a judge's performance ... does not render mandatory retirement at age 70 unconstitutional." *Trafelet v. Thompson,* 595 F. 2d at 628.

The second circuit also addressed the same issue in *Palmer v. Ticcione,* 575 F. 2d 459. That case involved the New York Education Law, which provided for compulsory retirement at the employer's discretion. The record in *Palmer* gave no indication whether the school board adopted a mandatory or a discretionary plan. However, in addressing the plaintiff's claim that a termination hearing was required, the court stated:

> [W]e can see no purpose for a hearing if appellant was retired under an across-the-board, mandatory retirement system. And even

> if a discretionary system was employed, we would be constrained to follow Johnson, supra, and deny this claim. In Johnson, we held that a hearing is not required because the benefits of holding such a hearing are outweighed by the burdens imposed upon the state by requiring a hearing in every case. 566 F. 2d at 869.

Palmer v. Ticcione, 575 F. 2d at 464.

CONCLUSION

Accordingly, the appellee moves this court to affirm the decision below on the ground that it is so manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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